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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~161~~ 70-161

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare, *Appellant*,

v.

RADIE WRIGHT, ET AL., *Appellees*.

No. ~~5211~~ 70-5211

RADIE P. WRIGHT, ET AL., *Appellants*,

v.

ELLIOT L. RICHARDSON, Individually and in his Capacity as Secretary of Health, Education and Welfare, *Appellee*.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR NATIONAL COUNCIL OF SENIOR CITIZENS AS AMICUS CURIAE

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BRIEF FOR NATIONAL COUNCIL OF SENIOR CITIZENS AS AMICUS CURIAE

INTEREST OF THE AMICUS

The National Council of Senior Citizens is the major organization of the elderly in the United States. The combined membership of its affiliated clubs numbers some three million older Americans. Practically all its members are retired or disabled workers who have been covered by the provisions of the Social Security Act throughout their working lives. Future member-

ship likewise will come mainly from the ranks of workers, many of whom will experience administrative action (with which they will disagree) suspending, diminishing or terminating OASDI benefits.

The National Council has appeared before this Court this term as *amicus* in *Allied Chemical & Alkali Workers of America, Local 1* v. *Pittsburgh Plate Glass Company, Chemical Division, et al.*, 70-910 and *National Labor Relations Board* v. *Pittsburgh Plate Glass Company, Chemical Division, et al.*, 70-961.

Statistics show that the prevalence and severity of disability accelerate with age. Severe disability is approximately ten times as prevalent among older adults as among younger adults. The proportion of disabled is approximately twice as large among those aged 35-44 as among those aged 18-34; three times as large among those 45-54; and five times as large among those aged 55-64 (*Social Security Survey of the Disabled*, Report No. 3, July, 1968). Because of the devastating impact that the suspension or termination of benefits has on the elderly and disabled poor, the National Council of Senior Citizens has a vital interest in presenting its views to this Court.

All parties have consented to the filing of this *amicus* brief.

ARGUMENT

DUE PROCESS REQUIRES A HEARING BEFORE TERMINATION OF DISABILITY BENEFITS

The issue in this case is whether Social Security disability benefits can be terminated without a prior hearing. It has long been established that a person aggrieved by action of a governmental agency has a constitutional right to a trial-type hearing on issues

of adjudicative fact. *Londoner* v. *City & County of Denver*, 210 U.S. 373 (1908); *Garfield* v. *United States ex rel. Goldsby*, 211 U.S. 249 (1908). Disability Insurance payments are statutorily mandated for persons qualified to receive them. 42 U.S.C. § 401, *et seq.*

Constitutional restraints apply as much to the withdrawal of disability benefits as to the withdrawal of public assistance, *Goldberg* v. *Kelly*, 397 U.S. 254 (1969); or to the disqualification for unemployment compensation, *Sherbert* v. *Verner*, 374 U.S. 398 (1963); or to the denial of a tax exemption, *Speiser* v. *Randall*, 357 U.S. 513 (1958); or to discharge from public employment, *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956).

The question of when a hearing must be held usually depends on the question of whether due process requires a hearing. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). A hearing is only meaningful if the affected individual is given fair opportunity to challenge the correctness of a decision before concrete damage has occurred. This is what is meant by "an opportunity [to be heard] at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1964). Notice and hearing necessarily must precede final administrative action predicated on the very harms sought to be avoided. *Opp Cotton Mills, Inc.*, v. *Administrator*, 312 U.S. 126, 152-53 (1941); *United States* v. *Illinois Cent. R.R.*, 291 U.S. 457, 463 (1934).

In cases where the government is the opposing party and in particular when there is a matter of change of government benefits, a hearing must be held before governmental action or deprivation of benefits. *Gon-*

salez v. *Freeman*, 334 F. 2d, 570 (D.C. Cir. 1964); *Morgan* v. *U.S.*, 304 U.S. 1 (1937); *Goldsmith* v. *U.S. Board of Tax Appeals*, 270 U.S. 117 (1926); *Garfield* v. *U.S.*, *supra*; *Londoner* v. *City and County of Denver*, *supra*.

The common and crucial factor in all of the above cases is the impact of the proposed administrative determination on the individual. Disability Insurance, like a retirement annuity, "is the mainstay of existence at the stage of life when one's ordinary work is no longer possible or available." *Garrott* v. *U.S.*, 340 F. 2d 615, 619 (Ct. Cl. 1965). A prior examination of the impact of termination of benefits on the beneficiary at an evidentiary hearing is therefore necessary.

1. Governmental Interests Served by Summary Termination Are Wholly Inadequate

The only possible governmental interests served by summary termination are avoiding the cost and administrative burden of pre-termination hearings. The clear intent of the Social Security Act is for the government to absorb the cost of mistakes, not the beneficiary. Administrative burden is a misnomer since a hearing is presently provided, but at a later point in time, and after the hardship brought on by discontinuance has set in.

The basic governmental interest at stake is the possible additional expense of prompt hearings and payments to ineligible beneficiaries. The protection against incorrect expenditure of public revenue is a legitimate concern. However, this concern does not justify summary termination. "The saving of welfare costs cannot justify an otherwise invidious classifica-

tion." *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969). Any possible such cost saving here cannot be a ground for denial of due process rights.

The cost argument was advanced and rejected in public assistance cases. *Goldberg* v. *Kelly, supra*, at p. 266. There are nearly five times as many public assistance recipients as disability recipients. Social Security Bulletin, 52, 71, Tables M-23, Q-17 (September 1969). Yet, even the significantly larger number of public assistance recipients does not impose a sufficient cost burden to dispense with the necessity of a hearing prior to termination.[1]

A payment incorrectly made may be recovered by the Social Security Administration. 42 U.S.C. § 404; 20 C.F.R. § 404.501 *et seq.* Unlike the difficulty, if not impossibility, of recouping incorrect public assistance benefits from judgment-proof recipients, Disability Insurance beneficiaries are not judgment-proof. Recovery can be made by adjustment of any subsequent Social Security payments to the individual or to other individuals on the basis of the recipient's earnings or from the latter's estate. 20 C.F.R. § 404.502. Adjustment may be made if the individual "at any time thereafter becomes so entitled." 20 C.F.R. § 404.502(a).

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[1] The number of terminations will probably be very small. Rehabilitation prospects are markedly unfavorable for disability beneficiaries. Only 9,000 disability beneficiaries were rehabilitated in 1967. In 1966, 50 percent of all terminations were due to death; 35 percent were due to conversion to retirement benefits at age 65; only 14 percent were due to either medical recovery or return to work. This latter figure represented only 1.8 percent of all beneficiaries. (R. Treitel, Financing of Disability Beneficiary Rehabilitation, 32 Social Security Bulletin 29, 30-31 (April 1969).)

2. The Disability Beneficiary's Interest Outweighs the Government's Interest in Summary Termination of Benefits

a. The Disabled Beneficiary's Sole Means of Subsistence Are at Stake

Brutal need is as present here as it is in the situation where public assistance is incorrectly terminated without a prior hearing. *Goldberg* v. *Kelly, supra,* at p. 264. During the period between termination and subsequent reinstatement because of continued disability, the eligible individual by definition is unable to engage in gainful activity to avoid the hardship suffered by that incorrect termination.[2]

Disability Insurance payments "provide only a fraction of the income available from earnings . . . and they are in many cases, below minimum budgetary standards of adequacy." L. Haber, "Disability, Work and Income Maintenance: Prevalence of Disability, 1966," 31 Social Security Bulletin 14 (May 1968). "With the income of both the disabled man and his wife included, half of the disabled worker beneficiaries were below the near-poverty level . . . ." L. Haber, The Disabled Beneficiary—A Comparison of Factors Related to Benefit Entitlement, 21, Report No. 7, Social Security Survey of the Disabled: 1966 (June 1969). Of these, 34 percent were below the poverty level. *Id.,* at 18.

The median income (including income of all family members) of disabled worker beneficiaries was $2,836

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[2] Entitlement to disability depends upon an ". . . inability to engage in any substantial gainful activity because of any medically determinable . . . impairment . . . ." 20 C.F.R. § 404.1501(b) (1) (i). The impairment is one that must result from anatomical, physiological or psychological abnormalities which are demonstrable by medically acceptable clinical and diagnostic techniques. 20 C.F.R. § 404.1501(c).

in 1966. Unmarried male beneficiaries had a median income of $1,599. Unmarried female beneficiaries had a median income of $1,170. Married male beneficiaries had a median income of $3,469. H. Brehm, The Disabled on Public Assistance, Table 4, Report No. 9, Social Security Survey of the Disabled: 1966 (June 1970).[3]

In at least one important respect, a Disability Insurance beneficiary's plight is even more precarious than that of a recipient of public assistance. While both must concentrate upon finding the means for daily subsistence when their benefits are erroneously terminated, the Disability Insurance beneficiary additionally must acquire the means to purchase or otherwise obtain the medical evidence needed to counter the decision to terminate. The public assistance recipient need only rarely acquire costly medical evidence to re-establish entitlement.

Moreover, an incorrectly terminated Disability Insurance beneficiary is unable, by definition and in fact, to secure substantial gainful employment; a recipient of public assistance is oftentimes qualified for employment.

3. The High Degree of Error in Administrative Determinations Terminating Disability Benefits Indicates Need for Hearings Prior to Termination

In balancing the beneficiary's interest in avoiding the destitution, indignity, and brutal hardship of un-

[3] In contrast, the average family yearly payment under AFDC-UP in May, 1967 was $2,556 exclusive of allowed income. 5 Welfare in Review 27, Table 7 (October 1967). In December, 1965 the average yearly payments were $950 for OAA, $1104 for AB and $1044 for APTD exclusive of allowed income. Welfare in Review, 1966 Statistical Supplement, 7, Table 3 (1966).

warranted termination of Disability Insurance payments with the government's interest in summary termination, consideration should be given to the rate of incorrect terminations of Disability Insurance benefits. Statistics on such determinations show such a high rate of error and reversal that the necessity for a considered and impartial judgment before termination is manifest.

Of disability recipients who have been terminated by the Administration and have requested hearings (between fiscal 1967 and 1970), fully 53 percent have obtained reversals. Upon an adverse hearing determination, discretionary review is available before the Appeals Council. Between fiscal 1967 and 1970, the Appeals Council reversed 11 percent of reviewed cases. (Letter of Charles Erisman, Acting Director, Bureau of Hearings and Appeals, dated August 20, 1970.)

The administrative record in all Disability Insurance cases is also poor. In fiscal 1970, of all hearings held[4] 44 percent reversed the administrative action taken. For the entire disability program's history, reversals have resulted in 30 percent of the hearings. In fiscal 1970 the Appeals Council reversed 11 percent of all the adverse hearing decisions they reviewed. For the entire Disability Insurance Program's history the Appeals Council has reversed 9 percent of adverse hearings reviewed. In fiscal 1970, of all adverse determinations that were reviewed in the district court, 27 percent were reversed or remanded and subsequently reversed. For the entire Disability Insurance Program's history fully 35 percent of all cases reviewed

[4] Includes denials on initial application and termination.

by the district court resulted in reversals or remands with subsequent reversals. (Letter of Charles Erisman, *supra*.)

Furthermore, there is no time period within which a hearing decision must be rendered. After termination, a beneficiary must first request a reconsideration before a post-termination hearing may be requested. 20 C.F.R. §§ 404.909, 404.917. The median days for reconsideration cases from date of request to date of determination is 68 days. The median days from date of request for a hearing and a decision is 110 days. (Letter of Francis J. Cullen, Chief, Disability Statistics Branch, Social Security Administration, dated August 11, 1970.) The median elapsed time for hearing decisions is thus over 5 months.

Given this poor record and the duration of incorrectly terminated beneficiaries' suffering before a hearing decision, due process compels the uninterrupted receipt of benefits until after a hearing and determination.

4. The Complex Factual Issues in a Decision To Terminate Should Not Be Decided Ex Parte

In the Disability Insurance Program complex factual issues must be resolved. There are a myriad of issues which may arise and they are rarely, if ever, anticipated or understood by the individual beneficiary.

The complexity and difficulty of objectively ascertaining the facts responsible for a Disability Insurance termination is demonstrated by the 53 percent reversal rate of such terminations at subsequently requested hearings. It is precisely because the Disability Insur-

ance Program presents such complex factual issues that a beneficiary is entitled to a trial-type hearing.

There is a trial-type procedure for the determination of initial eligibility for Disability Insurance, which follows a rigorous well-defined set of apparently objective standards. Entitlement to disability depends upon an "... inability to engage in any substantial gainful activity because of any medically determinable . . . impairment . . ." 20 C.F.R. Sec. 404.1501(b)(1)(i). Elaborate evidentiary requirements are established through complicated procedures, including a trial-type administrative review and judicial review. 20 C.F.R. § 404.901 *et seq.* and 20 C.F.R. § 404.1501, *et seq.*

These elaborate and complicated procedures are calculated to weed out the frivolous and ineligible. Common notions of fairness compel the conclusion that what is so rigorously won may not be lightly taken away.

5. The Administrative Procedure Act Applies to Pre-suspension Hearings in Disability Cases

For the reasons stated above, a due process hearing is constitutionally required prior to the suspension of social security disability benefits. Because a hearing is required, the Administrative Procedure Act applies. The APA applies in "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C.A. § 554(a). None of the six exceptions to this statute are applicable.

It is well established that the applicability of the APA to hearings "required by statute" includes hear-

ings that are constitutionally mandated even though not explicitly required by statute. In *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950), this Court held that the APA applied to constitutionally required hearings, and said: "We think that the limitation to hearings 'required by statute' in § 5 [5 U.S.C. § 554(a)] of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion."

An adjudication is defined in the APA as an "agency process for the formulation of an order" (5 U.S.C. § 551(7)) and an order is defined as "the whole or part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6).

A decision after hearing suspending disability benefits meets the requirement of finality, even though there are post-termination hearing procedures available. A final disposition is any disposition which directly affects a claimant's rights and has immediate financial impact on him. *A. E. Staley Mfg. Co.* v. *U. S.*, 310 F. Supp. 485 (D.Minn. 1970). In defining the analogous requirement of "final agency action" for purposes of judicial review under the APA (5 U.S.C.A. § 704), the courts have applied a pragmatic test which looks to the effect on the plaintiff, e.g., *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961), *Bucks County Cable TV, Inc.* v. *U. S.*, 299 F. Supp. 1325 (E.D. Pa. 1969).

The effect of suspending benefits to disabled individuals, like the appellants-appellees in this case, is obvious and irremediable, since no later recovery can recompense for the hardship of being deprived of the very means to live for a period of time. For this reason, a decision suspending benefits should be considered a "final" order for the purposes of 5 U.S.C. § 551(6) and the APA should apply.

Exemptions from the terms of the APA are not to be lightly presumed. The Act provides that a subsequent statute may not supersede or modify the APA "except to the extent that it does so expressly." 5 U.S.C. § 559. See also *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955).

The lower courts have ruled both ways on the application of the APA to disability claims hearings. Compare *Cappadora* v. *Celebrezze*, 356 F. 2d 1, 5 (2d Cir. 1966) (APA held applicable) and *Cohen* v. *Perales*, 412 F. 2d 44, 50 (5th Cir. 1969), *reh. den.* 416 F. 2d 1250 (5th Cir. 1969), *rev'd on other grounds*, *Richardson* v. *Perales*, 402 U.S. 389 (1971) (APA held not applicable). The reason given by the courts for holding the APA not applicable to disability benefit claims hearing is that the Social Security statute sets up a hearing procedure, so that under 5 U.S.C. § 556(b), the APA does not apply. *Cohen* v. *Perales, supra.*

This Court has ruled that it is not necessary to decide whether the APA applies, because the Social Security hearing procedure is substantially identical, *Richardson* v. *Perales, supra.* However, there is no statutory procedure for pre-suspension hearings and

no reason why the APA should not apply. Of course, because of the similarity of the existing Social Security hearing procedures to the APA, the administrative framework already exists for providing pre-suspension hearings meeting APA requirements.

The Appellants-Appellees Wright et al. and other *amici* have pointed out that the relief ordered by the District Court below will permit the Social Security Administration to adopt procedures in compliance therewith, which would fall short of minimal due process requirements. This Court held similar procedures unconstitutional in *Goldberg* v. *Kelly,* 397 U.S. 254 (1969). The constitutional arguments are persuasive for requiring procedures to guarantee the right to appear personally and present oral evidence, the right to confrontation and cross-examination, the right to retain counsel, and the right to a reasoned decision based solely on the legal rules and evidence adduced at the hearing. But these safeguards are also guaranteed by the APA which, for the reasons stated above, should apply.

CONCLUSION

For all of the foregoing reasons, the decision of the Court below should be reversed insofar as it held that the procedural requirements of due process for recipients of Social Security Disability Insurance benefits prior to suspension or termination of benefits, are satisfied with something less than the safeguards specified by this Court in *Goldberg* v. *Kelly,* 397 U.S. 254

(1969). In all other respects, the decision below should be affirmed.

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Respectfully submitted,

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